"beyond the scope of a routine customs search and inspection," it could only be justified with a showing of reasonable suspicion.[26]

What constitutes a non-routine search? The court has suggested a search becomes non-routine when border officials conduct "highly intrusive searches of the person-dignity and privacy interests."[27] Similarly, searches that cause "serious damage to, or destruction of, [property]" *may* also be non-routine.[28] Notwithstanding the Court's lack of a concrete standard, lower courts have carved out certain types of non-routine border searches that require reasonable suspicion. These include strip searches,[29] medical x-ray examinations,[30] and body cavity inspections.[31] More recently, lower courts have struggled to find consensus on how searches of electronic devices at the border fit within the warrant exception.

Generally, "the circuits draw a distinction between manual or basic searches . . . and forensic or advanced searches."[32] According to CBP's electronic search policy, basic or manual searches involve an officer "manually reviewing the contents of electronic devices" at the border and do not require suspicion.[33] Advanced or forensic searches are conducted by "connect[ing] external equipment . . . to an electronic device [in order to] gain access to the device, . . . copy, and/or analyze its contents" and require a "reasonable suspicion of activity in violation of the laws enforced or administered by CBP."[34] Notably, forensic searches often require sending the

[26] *Id.*
[27] Flores-Montano, 541 U.S. at 152.
[28] *Id.* at 154.
[29] United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984).
[30] Montoya de Hernandez, 472 U.S. 531 (1985).
[31] *Id.*
[32] United States v. Xiang, No. 419CR980HEAJMB, 2021 WL 5772670, at *8 (E.D. Mo. July 23, 2021), *report and recommendation adopted*, No. 4:19CR980 HEA, 2021 WL 4810556 (E.D. Mo. Oct. 15, 2021).
[33] *Id.*; U.S. Customs and Border Protection, CBP Directive No. 3340-049A, "Border Search of Electronic Devices," Jan. 4, 2018 https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/CBP-Directive-3340-049A-Border-Search-of-Electronic-Media-Compliant.pdf.
[34] *Id.*

device to an off-site laboratory for processing, which can take anywhere from weeks to months. While courts and commentators sometimes differ in the exact terminology used to describe the two types of searches, this paper will refer to them as "Manual" and "Forensic" searches.

B. *Riley*'s Reasoning: A Potential Shift in the Law

The electronic border search exception question became even more relevant following the Court's decision in *Riley v. California* that acknowledged the unique attributes of cell phones in the criminal search setting, holding that "the search incident to arrest exception does not apply to cell phones."[35] Rather, "a warrant is generally required before" police officers may search a cell phone incident to arrest.[36]

This decision rested on two lines of thought: the 1) privacy and 2) untethering rationale. First, the unique nature of digital data causes people to have an increased expectation of privacy relating to their cell phones. As the Court noted, "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person," holding not only more information but a wider array of content.[37] Second, cell phone searches incident to arrest "untether" the exception from its justifications.[38] The court noted that while the exception is supported by concerns of "harm to officers and destruction of evidence . . . there are no comparable risks when the search is of digital data."[39] Taken together, circuit courts have differed in applying *Riley's* privacy and untethering rationale to electronic border searches.

[35] Riley, 573 U.S. at 393-401 (2014).
[36] *Id*.
[37] *Id.* at 393.
[38] *Id.* at 386.
[39] *Id.*

Part II: Cell Phone Searches and Circuit Splits

So far, six circuit courts have considered the issue of electronic border searches, coming to different results. This section summarizes the existing circuit splits and highlights the 1) varying levels of suspicion, if any, required, 2) scope of the border exception, 3) and the contexts in which the electronic border search question tends to arise. Table I provides a summary of the existing law in each circuit below.

I. First Circuit:

In *Alasaad v. Mayorkas*, several plaintiffs challenged the aforementioned CBP electronic search policy following the search of their devices upon return to the United States. The First Circuit rejected a warrant or probable cause requirement for electronic border searches since it would "hamstring the [government's] efforts to prevent border-related crime and protect this country from national security threats."[40] Plaintiffs, however, argued that in light of *Riley*, electronic searches at the border "are non-routine searches requiring at least reasonable suspicion."[41] The court countered that even though electronic searches "do not fit neatly into other categories of property searches," *manual* electronic searches at the border "do not involve an intrusive search of a person, like [the non-routine search in *Montoya de Hernandez*.]"[42] Notably, this conclusion applied only to manual searches, as the First Circuit did not explicitly consider the constitutionally required level of suspicion for forensic searches.

Lastly, the court in *Alasaad* widely construed the scope of what can be searched under the border search exception. The First Circuit rejected the Ninth Circuit's holding that the border search exception applied solely to intercepting contraband[43] and held instead that "[a]dvanced

[40] Alasaad v. Mayorkas, 988 F.3d 8, 17-18 (1st Cir. 2021).
[41] *Id.* at 18.
[42] *Id.*
[43] *Id.* at 19-21.

border searches of electronic devices may be used to search for contraband, evidence of contraband, or for evidence of activity in violation of the laws enforced or administered by CBP or ICE."[44]

II. Fourth Circuit

Decisions in *United States v. Kolsuz* and *United States v. Aigbekaen* establish the Fourth Circuit's electronic border search standard. In *Kolsuz*, the court considered a manual and forensic search of a known firearm smuggler departing from Washington Dulles International Airport.[45] According to the court, digital data's scale and sensitivity, combined with *Riley*'s holding, render a forensic search "highly intrusive" and "must be treated as a non-routine border search, requiring some form of individualized suspicion."[46] Although the court held that forensic searches were non-routine, they did not clarify the necessary level of "individualized suspicion," leaving open the possibility that reasonable suspicion *or* probable cause may be required.[47] Similarly, the court dodged the question of what level, if any, *manual* searches require.[48]

Meanwhile, *Aigbekaen* addressed the scope of the electronic border search. Law enforcement officials were tipped off that the defendant was involved in sex-trafficking.[49] This triggered an investigation that revealed Aigbekaen was returning from abroad.[50] When he got to the airport, the government was ready. CBP officials seized his computer, phone, and iPod to conduct a forensic search that lasted two weeks and revealed evidence of sex trafficking.[51]

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[44] *Id.* at 21.
[45] United States v. Kolsuz, 890 F.3d 133, 136 (4th Cir. 2018), *as amended* (May 18, 2018).
[46] *Id.* at 144, 146.
[47] *Id.* at 147-48.
[48] *Id.* at 146, n. 5 ("Because Kolsuz does not challenge the initial manual search of his phone at Dulles, we have no occasion here to consider whether *Riley* calls into question the permissibility of suspicionless manual searches of digital devices at the border.")
[49] United States v. Aigbekaen, 943 F.3d 713, 717 (4th Cir. 2019).
[50] *Id.*
[51] *Id.*

Notwithstanding law enforcement having "not only reasonable suspicion but probable cause," the Fourth Circuit found the forensic search unconstitutional.[52] Applying *Riley*'s untethering rationale, the court held that "the Government must have individualized suspicion of an offense that bears some nexus to the border search exception's purposes of protecting national security, collecting duties, blocking the entry of unwanted persons, or disrupting efforts to export or import contraband."[53] Since Aigbekaen was suspected of *domestic* crimes, not border-related ones, his search was invalid.[54]

III. Seventh Circuit

The Seventh Circuit has confronted electronic border searches twice but avoided articulating a clear standard. Both cases involve a manual and forensic search of a suspected possessor of child sexual abuse material (CSAM).[55] Neither case establishes "what level of suspicion is required (if any) for searches of electronic devices at the border" and instead both held the searches permissible under the good faith exception.[56]

IV: Eighth Circuit

The Eighth Circuit has no binding precedent on electronic border searches, but a current case on appeal will provide the court with an opportunity to comment on the issue. *United States v. Xiang* involves a former Monsanto employee charged with committing economic espionage.[57] Defendant Haitao Xiang is a citizen of the People's Republic of China and a legal permanent resident of the United States who worked for Monsanto.[58] Part of his duties involved assisting

[52] *Id.* at 721.
[53] *Id.*
[54] *Id.*
[55] United States v. Wanjiku, 919 F.3d 472, 474-76 (7th Cir. 2019); United States v. Skaggs, 25 F.4th 494, 496-500 (7th Cir. 2022), reh'g denied, No. 20-1229, 2022 WL 1571050 (7th Cir. May 18, 2022).
[56] Wanjiku, 919 F.3d at 488-89.
[57] United States v. Xiang, No. 419CR980HEAJMB, 2021 WL 5772670, at *1 (E.D. Mo. July 23, 2021), report and recommendation adopted, No. 4:19CR980 HEA, 2021 WL 4810556 (E.D. Mo. Oct. 15, 2021).
[58] *Id.*

with creating Monsanto's "Nutrient Optimizer" — an "online farming software platform . . . [used] to collect, store and visualize critical agricultural field data [to increase farming productivity.]"[59]

One day, Xiang resigned to allegedly pursue other work.[60] Following a suspicious exit interview with Xiang, Monsanto communicated to law enforcement that they were concerned about their former employee stealing proprietary information.[61] Soon after, CBP was notified of a "Red Flag Scenario": Xiang was scheduled to fly to China on a one-way ticket.[62] Customs officers seized a computer and other electronic devices as he boarded his flight at Chicago O'Hare International Airport.[63] CBP then sent the devices to the FBI St. Louis office for a forensic search that revealed several documents with confidential trade secrets and intellectual property.[64] All told, the search took 17 days from confiscation to completion.[65]

Based on existing case law in other circuits, the magistrate judge concluded neither a warrant nor probable cause were necessary.[66] Although the magistrate did not decide whether the search was non-routine, he concluded it was permissible regardless since officials had a reasonable suspicion that Xiang possessed trade secrets on his devices.[67] The trial court agreed, finding that the totality of the circumstances supported a "reasonable suspicion that Defendant was currently engaging in activity which may violate the law."[68]

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[59] Department of Justice, "Chinese National Sentenced for Economic Espionage Conspiracy," Apr. 7, 2022, https://www.justice.gov/opa/pr/chinese-national-sentenced-economic-espionage-conspiracy.
[60] Xiang, 2021 WL 5772670, at *2.
[61] *Id.* at *3.
[62] *Id.*
[63] *Id.* at *4.
[64] *Id.* at *5.
[65] *Id.* at *3-6.
[66] *Id.* at *13.
[67] *Id.* at *13, *19 ("Because the investigators in this case possessed reasonable suspicion, our Court may presume, without deciding, that the search at issue was a forensic or advanced search that required a showing of reasonable suspicion.")
[68] United States v. Xiang, No. 4:19CR980 HEA, 2021 WL 4810556, at *3 (E.D. Mo. Oct. 15, 2021).

While the case is still pending appeal, the trial court's finding of reasonable suspicion for a forensic search suggests that the Eight Circuit will not only comment on the required level of suspicion for electronic border searches but also whether it matters if the electronic search is manual or forensic.

V: Ninth Circuit

Two cases outline the Ninth Circuit's treatment of electronic border searches. In *United States v. Cotterman*, the defendant triggered an alert through the Treasury Enforcement Communication System (TECS) for past abuse of minors when returning from Mexico at the Lukeville, Arizona, Port of Entry.[69] ICE agents retained the defendant's computers for a forensic search.[70] The court concluded that while a warrant and probable cause was not necessary, forensic searches "require[] a showing of reasonable suspicion."[71]

The *Cotterman* court's reasoning foreshadowed *Riley* by one year. In short, forensic searches intrude on and copy digital data containing personal and intimate details of people's lives from both actively used and deleted files.[72] As the court noted, "[i]t is as if a search of a person's suitcase could reveal not only what the bag contained on the current trip, but everything it had ever carried."[73] In sum, a forensic search constitutes "a substantial intrusion upon personal privacy and dignity" that requires reasonable suspicion.[74] Six years later, in *United States v. Cano*, the Ninth Circuit tightened the standard for forensic searches by requiring a reasonable suspicion of contraband on the device.[75]

[69] United States v. Cotterman, 709 F.3d 952, 957 (9th Cir. 2013).
[70] *Id.* at 958.
[71] *Id.* at 968.
[72] *Id.* at 964-65, 968.
[73] *Id.* at 965.
[74] *Id.* at 968.
[75] United States v. Cano, 934 F.3d 1002, 1020 (9th Cir. 2019).

However, the *Cano* court did not stop there. The court drastically limited the border search exception, holding "cell phone searches at the border, whether manual or forensic, must be limited in scope to a search for digital contraband."[76] This conclusion stems from the Ninth Circuit's view that the border exception "must be conducted to 'enforce importation laws.'"[77] Thus, border officials may not "conduct a warrantless search for evidence of past or future border-related crimes."[78] Put differently, within the Ninth Circuit, a permissible electronic border search is "limited to searching for contraband only."[79]

This standard leads to some bewildering results. Take the facts of the *Cano* case. CBP officials found 14 kilograms of cocaine hidden in the defendant's spare tire as he traveled into the U.S. from Mexico.[80] Agents clearly had a reasonable suspicion "that [the defendant's] phone . . . contain[ed] evidence [of drug trafficking]" and conducted a forensic search.[81] Yet this search violated the Fourth Amendment since the agents did not have "any objectively reasonable suspicion that the digital data in the phone contained contraband."[82]

VI: Eleventh Circuit

Several investigations and reports to the National Center for Missing and Exploited Children "suggested that Karl Touset was involved with [CSAM.]"[83] On December 21, 2014, Touset arrived at Hartsfield-Jackson Atlanta International Airport with a wide range of electronics.[84] CBP officers manually inspected Touset's phones and camera following his arrival

[76] *Id.* at 1007.
[77] *Id.* at 1013 (quoting United States v. Soto-Soto, 598 F.2d 545, 549 (9th Cir. 1979)).
[78] *Id.* at 1018.
[79] *Id.* at 1019.
[80] *Id.* at 1008.
[81] *Id.* at 1021.
[82] *Id.*
[83] United States v. Touset, 890 F.3d 1227, 1230 (11th Cir. 2018).
[84] *Id.*

and conducted a forensic search of his laptops and external hard drives.[85] This latter search revealed CSAM and Touset was later convicted on related charges.[86] On appeal, the Eleventh Circuit considered the required level of suspicion, if any, for electronic searches at the border.

The court began by taking as given the fact that border searches "never" require a warrant or probable cause.[87] Furthermore, the *Touset* court rejected a reasonable suspicion requirement for either manual or forensic searches of electronics for three reasons.[88]

First, under Eleventh Circuit precedent, non-routine searches requiring reasonable suspicion only involve "highly intrusive searches of a person's body."[89] Even though a search of phones or computers "may intrude on the privacy of the owner, a forensic search of an electronic device is a search of property" requiring no suspicion.[90]

Second, a traveler's privacy interests, in terms of the personal nature of cell phone data, do not outweigh the government's interest in securing the border.[91] In the court's eyes, travelers have come to expect a level of discomfort when traveling and "are free to leave any property they do not want searched — unlike their bodies — at home."[92]

Lastly, the court held *Riley* inapplicable to the border search context by distinguishing the rationale for each of the warrant exceptions. The search incident to arrest exception in *Riley* is supported by concerns of "harm to officers and destruction of evidence"; however, the border search exception is justified by the sovereign's paramount interest in policing the border.[93] While the search incident to arrest exception "did not 'ha[ve] much force with respect to digital content

[85] *Id.*
[86] *Id.* at 1230-31
[87] *Id.* at 1232.
[88] *Id.* at 1233-36.
[89] *Id.* at 1234 (quoting United States v. Alfaro-Moncada, 607 F.3d 720, 729 (11th Cir. 2010)).
[90] *Id.*
[91] *Id.*
[92] *Id.* at 1235.
[93] *Id.* at 1235.

on cell phones" and digital data "does not pose 'comparable risks,'" things are different at the border.[94] Digital data on phones, the court reasoned, pose the same "risk" of containing contraband material, like CSAM.[95] In fact, while *Riley* highlighted how technological developments render cell phones unique carriers of personal information, the Eleventh Circuit concluded that "sophisticated technological means for concealing contraband only heightened the need of the government to search property at the border unencumbered by judicial second-guessing."[96]

Table I: Summary of Circuit Split(s)[97]

	1st Circuit	4th Circuit	7th Circuit	8th Circuit	9th Circuit	11th Circuit
Manual Search	No Suspicion Required	Unanswered	Unanswered	Pending Appeal	No Suspicion Required	No Suspicion Required
Forensic Search	Warrant or Probable Cause Not Required	Individualized Suspicion	Unanswered	Pending Appeal	Particularized Suspicion of Contraband	No Suspicion Required
Permissible Scope	Any crimes enforced by CBP or ICE	National security, duties, blocking entry of unwanted persons, contraband	Unanswered	Pending Appeal	Contraband *only*	Unanswered

C. Why Does This Matter?

While courts have struggled to come up with a cohesive standard, some commentators have questioned the importance of the border exception to searches of electronics. Professor Orin Kerr has suggested that cyber criminals crossing the border can simply wipe their devices clean and "then load [their] files remotely onto [their] computers using an encrypted tunnel."[98] Were this to occur, Kerr concludes that "the state of Fourth Amendment law may not matter."[99]

[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] Adapted from Orin S. Kerr, Computer Crime Law, 5th Ed. 546.
[98] Orin S. Kerr, Computer Crime Law, 5th Ed. 550-51.
[99] *Id.* at 551.

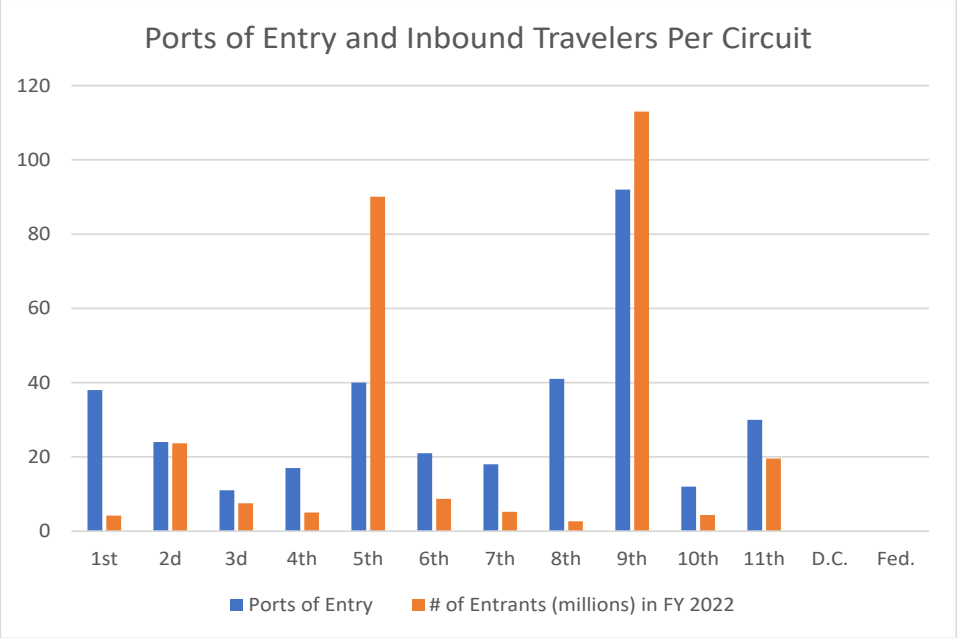
This observation drastically simplifies the issues involved. While some sophisticated criminals might undertake the subversive measures suggested by Kerr, others will succumb to convenience, necessity, or mere forgetfulness. For example, a recent indictment being heard in the District Court for the District of Columbia involves an alleged cyber-criminal who arrived at Los Angeles International Airport with multiple laptops, microcomputers, memory cards, and cell phones with "location spoofing" programs related to potential crimes.[100]

Moreover, Kerr's comments ignore the full scope of border search concerns. As the case law demonstrates, many are not world-renowned hackers but rather possessors of CSAM. Others, like those involved in economic espionage, are traveling with their electronics precisely to transport information they could not otherwise.

However, regardless of the person or contraband they possess, the circuit splits are important in their own right. Existing law creates inconsistencies and confusion that jeopardizes national security. As Figure I demonstrates, each circuit encompasses a different number of ports of entry and flow of entrants:

[100] United States v. Sterlingov, 573 F. Supp. 3d 28, 33 (D.D.C. 2021)

Figure 1



Source: Data from CBP; Graph Created by Author

As the law currently stands, the Ninth Circuit maintains the strictest standard for law enforcement to meet while encompassing the largest number of ports of entry and highest traveler entry. Savvy criminals may exploit the circuit split by rerouting travel through the Ninth Circuit where customs agents have less latitude to search electronic devices. By resolving the split, the Supreme Court would ensure that would-be criminals are subjected to uniform standards of examination for their electronics.

Part III: What the Standard Should Be

This section attempts to provide a workable standard to resolve the circuit splits. To begin, electronic searches at the border should not require a warrant. The border search exception to acquiring a warrant plays a vital role in "national self protection" and *Riley* is not to the

contrary.[101] In its broadest terms, *Riley*'s holding is limited to the search incident to arrest context and is, thus, not dispositive.[102] *Riley*'s reasoning is not a perfect fit to the border search exception either. The untethering rationale in *Riley* highlighted that cell phones do not present risks of "harm to officers [or] destruction of evidence" that justify the search incident to arrest exception.[103] Yet, as both the Ninth and Eleventh Circuits concluded, electronic devices present the same risks of contraband at which the border search exception is aimed. Overall, no circuit has required a warrant for electronic searches at the border. Neither should a unifying standard.

Riley does, however, have some applicability in terms of privacy. The decision underscores that digital data is "quantitative[ly]" and "qualitative[ly]" different "from other objects" people travel with.[104] This supports requiring a distinction between manual and forensic electronic searches. Manual searches are routine and should require no suspicion. Here, the First Circuit's reasoning in *Alasaad* is instructive. While a stranger scrolling through your phone is not ideal, it does not rise to the intrusiveness of a strip search or body cavity examination.[105] After all, a manual search is temporary and does not leave any data with the government.

Forensic searches are different. They allow the government to not only search deeper into one's data but also copy the entire contents of one's device. The Eleventh Circuit's contention that digital devices are mere property ignores *Riley*'s privacy rationale. Computers, phones, and other devices are distinct in that one can "[reconstruct] [t]he sum of an individual's private life" through digital data and reveal deeply personal or sensitive content otherwise inaccessible.[106]

[101] Ramsey, 431 U.S. at 618.
[102] Riley, 573 U.S. at 401-2.
[103] *Id.* at 386.
[104] *Id.* at 393.
[105] Alasaad, 988 F.3d at 18.
[106] Riley, 573 U.S. at 394.

Take, for example, the opening example involving Rejhane Lazoja, where a forensic search exposed photographs that her religion mandates to keep private. Similarly, CBP agents made headlines when they allegedly conducted a forensic search of a NASA engineer's phone containing sensitive government information.[107] And although the Eleventh Circuit contends people have come to expect discomfort when traveling, few have anticipated leaving behind a copy of their computer or phone when leaving an airport or border checkpoint. Similarly, *Touset* ignores reality in suggesting that people "are free to leave any [devices] they do not want searched . . . at home."[108] Rather, phones (and other devices) could be considered "an important feature of human anatomy," following people around wherever they go.[109]

Lastly, a unifying electronic border search standard must address the scope of the border search exception. Circuits have differed in their approaches. It is important to begin with the strictest standard of the Ninth Circuit: the border search exception only applies to contraband.[110] Reading the border search exception in such a way completely misinterprets the purpose of the exception to police entry of unwanted things *and* people into the country. In practical terms, the Ninth Circuit's interpretation would mean that the border search exception "would rarely . . . apply to an electronic search of a cell phone outside the context of child pornography."[111]

Neither is the Fourth Circuit's *Aigbekaen* standard tenable. Distinguishing between domestic and border-related searches might make sense at first glance but leads to impractical outcomes upon closer inspection. Take two travelers involved in human trafficking. One, like in *Aigbekaen*, committed the crimes domestically and the other is involved in a cross-border

[107] Kaveh Waddell, "A NASA Engineer Was Required to Unlock His Phone at the Border," Feb. 13, 2017, https://www.theatlantic.com/technology/archive/2017/02/a-nasa-engineer-is-required-to-unlock-his-phone-at-the-border/516489/.
[108] Touset, 890 F.3d at 1235.
[109] Riley, 573 U.S. at 385.
[110] Cano, 934 F.3d at 1007.
[111] *Id.* at 1021 n. 13.

operation. The government has equal interest in preventing both travelers from entering the country as both present the same potential for harm. Thus, the *Alasaad* standard provides a more sensible approach allowing CBP agents to utilize the border search exception for all laws they are legally empowered to enforce as guardians of the border, while maintaining a reasonable suspicion requirement for more intrusive searches.

Conclusion

Rather than go to trial, the government settled the Lazoja case, agreeing to delete any digital copies of her phone.[112] For many, this represented a victory for privacy rights. At the same time, as the circuit cases demonstrate, electronic border searches help prevent a myriad of threats and harms from contraband materials like CSAM and stolen trade secrets to criminals crossing the border. The proper way to balance privacy and security is to maintain the warrant exception to electronic border searches and implement a bifurcated standard: no suspicion for manual searches and reasonable suspicion for forensic searches. While the circuits remain split on this issue, it remains to be seen if the Supreme Court will step in and adopt a workable standard to resolve the split.

[112] Stipulation of Dismissal with Prejudice, Lazoja v. Nielsen, 2:18-cv-13113-SDW-LDW (D.N.J. 2018)

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The Honorable Judge Timothy James Kelly
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Dear Judge Kelly:

I am a rising third-year student at Columbia Law School, and I write to apply for a clerkship in your chambers for the 2025–26 term or any term thereafter.

I am interested in clerking in your chambers for two main reasons. First, I am seeking a career-long mentor—ideally someone with a long background in government service. Conversations with your former clerks have conveyed the sense that a clerkship in your chambers would meet and exceed this goal. Second, from August 2024 through August 2025, I will clerk for Judge Jerry E. Smith on the Fifth Circuit Court of Appeals. Following that, I would like to gain further experience at the district court level before embarking on a career as a litigator.

Enclosed please find my resume, law and undergraduate transcripts, and writing sample. Arriving separately are letters of recommendation from Professors Talia Gillis (857-919-2525, tbg2117@columbia.edu), Jessica Bulman-Pozen (212-854-1028, jbulma@law.columbia.edu), and Philip Bobbitt (212-854-4090, PBobbitt@law.utexas.edu). Additionally, Professor Philip Hamburger (212-280-3878, hamburger@columbia.edu) has agreed to serve as a further reference.

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Matt Winesett

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American Enterprise Institute (AEI), Washington, DC
Various Roles June 2017 – July 2020; January 2021 – July 2021
Assisted AEI's president with the drafting of speeches and essays. Redesigned and wrote weekly newsletter. Created data visualizations and infographics to convey AEI's research to general audiences. Hosted and produced "Banter," AEI's flagship podcast. Edited submissions and contributed to AEIdeas, AEI's blog, and assisted editor-in-chief with research and drafts for speeches and columns. Captained AEI's softball team.

SELECTED PUBLICATIONS

"Historic Preservation as Appropriation: Renewing Takings Challenges to Abusive Land-Use Restrictions After *Cedar Point*," *Columbia Journal of Law & Social Problems* (forthcoming).
"Camus's Plague—and Ours," NationalReview.com (April 4, 2020).
"Charles Krauthammer's Uncommon Greatness," NationalReview.com (December 24, 2018).

INTERESTS: Modern history, English literature, golf, softball

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Program: Juris Doctor

Matthew H Winesett

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A
L6269-1	International Law	Cleveland, Sarah; Clooney, Amal	4.0	A
L9523-1	Reading Group: Is The Supreme Court Remaking Administrative Law	Merrill, Thomas W.	1.0	CR
L8072-1	S. Advanced Constitutional Law: Reading the Constitution [Minor Writing Credit - Earned]	Amar, Akhil	2.0	A

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	A
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A
L6675-1	Major Writing Credit	Glass, Maeve	0.0	CR
L6683-1	Supervised Research Paper	Glass, Maeve	2.0	A
L6822-1	Teaching Fellows	Gillis, Talia	4.0	CR
L6549-1	Terror and Consent	Bobbitt, Philip C.	3.0	A

Total Registered Points: 16.0

Total Earned Points: 16.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Glass, Maeve	4.0	A-
L6108-1	Criminal Law	Godsoe, Cynthia	3.0	B+
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	A-
L6679-1	Foundation Year Moot Court		0.0	CR
L6121-3	Legal Practice Workshop II	Smith, Elizabeth	1.0	P
L6116-1	Property	Balganesh, Shyamkrishna	4.0	A-

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-1	Legal Methods II: Financial Methods for Lawyers	Talley, Eric	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-1	Civil Procedure	Cleveland, Sarah	4.0	A
L6105-2	Contracts	Gillis, Talia	4.0	A
L6113-4	Legal Methods	Strauss, Peter L.	1.0	CR
L6115-3	Legal Practice Workshop I	Izumo, Alice; Smith, Elizabeth	2.0	P
L6118-1	Torts	Liebman, Benjamin L.	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 62.0

Total Earned JD Program Points: 62.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	2L
2021-22	Harlan Fiske Stone	1L

June 11, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I am writing to strongly recommend Matthew Winesett for a clerkship in your chambers. I was Mr. Winesett's professor for Contract Law during the Fall 2021 semester. In Fall 2022 Mr. Winesett was my teaching assistant for Contract Law.

As a student, Mr. Winesett stood out for how prepared he was for class and how intelligently he participated in class. Cold-calling in classes can be a stressful experience for students at times, but Mr. Winesett was exceptionally strong at thinking on his feet and articulating his thoughts even when he was unsure of the answer to my question. Both in his mid-term and final exam, Mr. Winesett demonstrated his legal writing and analysis skills, by mastering the material and eloquently applying his knowledge to new factual patterns. During office hours, Mr. Winesett asked thoughtful questions indicating his dedication to truly understanding the material and his interest in the legal issues beyond the particular case we were studying. Mr. Winesett ended up writing one of the best exams in the class, placing him within the top 15% of my class.

As a teaching assistant, Mr. Winesett taught weekly sessions in which he discussed class material and helped the students organize their studies. Mr. Winesett also held weekly office hours and was designated as the group leader of 15 students (out of 102) for whom he organized social events and checked in with them if they missed class. I have received glowing feedback from students about how knowledgeable and attentive Mr. Winesett was as a teaching assistant.

I expect Mr. Winesett to continue to excel at Columbia Law School and I have no doubt that he would stand out as a smart, hardworking and committed clerk.

In short, I strongly recommend Mr. Winesett for your clerkship. Please feel free to contact me if I can be of further assistance.

Sincerely,

Talia B. Gillis
Associate Professor of Law

Talia Gillis - tbg2117@Columbia.edu

June 11, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I have been asked to write a recommendation for Mr. Winesett who is applying to clerk in your chambers for the 2025-26 term. I am very pleased to do so.

Mr. Winesett was a student in a complex class, studying constitutional and international law issues arising from the wars on terror. It was a very competitive class with a number of the best students at Columbia in attendance. Nevertheless, in that company, Mr. Winesett shone: he was always well-prepared, his comments and answers were invariably to the point, and he good-naturedly engaged with other students with whom he disagreed. He was such a pleasure to have as a student that I have recruited him to be a teaching assistant this coming year.

You will have his resume and so you will know that he graduated *summa cum laude* from the University of Virginia; that he worked for 3-4 years at the American Enterprise Institute and that he has accepted a clerkship with Judge Jerry Smith on the 5th Circuit.

What I can add is an experienced, if not jaundiced, assessment of his transcript (all A's, save for one B+ from a visiting professor, A's from some of the more demanding senior professors); and a personal assessment of his research skills and collegial abilities.

On those bases, I recommend Mr. Winesett without reservation. He will make an excellent law clerk who is obsessively hard-working, invariably well-prepared, but has a good sense of humor and a considerable hinterland of learning.

If I can be of any assistance on this matter, please do not hesitate to contact me.

Yours very truly,

Philip Bobbitt
Herbert Wechsler Professor of Federal Jurisprudence
Columbia Law School

Philip Bobbitt - bobbitt@law.columbia.edu - 212-854-4090

June 11, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I am delighted to recommend Matt Winesett for a clerkship in your chambers. Matt is a deeply intelligent Columbia Law student who is a strong writer, a hard worker, and an independent thinker. Although he is apt to be reading Burke and Hayek in his free time, he does not take himself too seriously; he is able to laugh at himself and to make others laugh with his wit. I believe he will make an excellent law clerk and recommend him to you highly.

I met Matt in the fall of 2022, when he was one of the best students in my Legislation and Regulation class. The course was a large lecture of approximately 125 students, and Matt stood out for his excellent final exam. In particular, his response to the essay question was the best in the class. The question asked students to respond to a (slightly edited, real) proposal to bring back the legislative veto invalidated by Chadha v. INS; the proposal suggested that this would be an appropriate way to restore Congress's role in the rulemaking process and to rebalance legislative and executive power. Although Matt agreed with the call for Congress to play a greater role in governing, he disagreed that the legislative veto was a promising approach to achieve this end. In his essay, he offered a cogent analysis of Chadha as well as vetoes that had appeared in other legislation, such as the National Emergencies Act. He then challenged several premises underlying the proposal, drawing on case law and scholarship concerning administrative law issues from delegation to the major questions doctrine to the Congressional Review Act. I was impressed by Matt's ability to make a powerful but nuanced argument, synthesize a wide variety of materials, and write cogently during a timed exam.

Matt's response to the fact pattern on the exam was also excellent. He caught every issue, including questions about the application of *Mead*, *Chevron*, and *City of Arlington*, as well as procedural questions concerning exceptions to notice-and-comment rulemaking. He also provided thorough and lucid analyses, considering arguments on both sides of close questions and reasoning in a principled and thorough way to reach conclusions. Although I blind-graded the exams, I was not surprised Matt's was at the top of the pile. He had demonstrated perceptive engagement with the course material throughout the semester, and the questions he submitted for our review session did not seek clarification of points we had covered, as is the norm, but rather asked about connections across different areas of law (such as policy impoundments and deferred removal).

In meetings since the Legislation and Regulation class concluded, I have been pleased to talk with Matt about his varied interests, from eighteenth-century American history to appellate advocacy to softball. Even while he is busy with a full course schedule, Matt chooses to read widely for pleasure; Gordon Wood's *Creation of the American Republic*, Eric Foner's *Reconstruction*, Mary Ann Glendon's *Rights Talk*, and Akhil Amar's *The Bill of Rights* are just some of the titles he has recently picked up outside of class. Matt also remains interested in policy. Before attending law school, he worked for more than three years at the American Enterprise Institute where he served as a digital team manager, making research papers accessible to a wider public, and hosted the flagship podcast, interviewing a range of guests. Matt is very serious about his legal and policy pursuits, but he wears them lightly and is a pleasure to talk with—engaging, with a good sense of humor.

I am confident Matt would be an asset to any chambers as a law clerk, and would be happy to speak with you about his candidacy. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely yours,

Jessica Bulman-Pozen

Jessica Bulman-Pozen - jbulma@law.columbia.edu - 212-854-1028

MATT WINESET
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Writing Sample

The following writing sample is an excerpt from my Note written for the Columbia Journal of Law and Social Problems, which the Journal will publish next year. The Journal's Note program requested a thirty-five to forty-five page Note on a topic of my choice. I wrote about the growth and abuse of historic preservation laws since the Supreme Court's 1978 decision in *Penn Central Transportation Company v. New York City*. Specifically, my Note argued historic preservation ordinances and similar land-use restrictions appear newly vulnerable to challenges under the Takings Clause in the wake of the Court's 2021 decision in *Cedar Point Nursery v. Hassid*. In formatting the Note and preparing citations I complied with the requirements of the Journal's handbook. I have edited this sample for brevity, omitting sections of the argument, but am happy to make the full Note available upon request.

Historic Preservation as Appropriation: Renewing Takings Challenges to Abusive Land-Use Restrictions After *Cedar Point*

In the 1922 case Pennsylvania Coal v. Mahon*, Justice Holmes proclaimed that regulations going "too far" constituted takings under the Fifth Amendment. But now over a century later, courts rarely find a land-use restriction they think fits this description. This is largely thanks to* Penn Central v. New York City*, the Supreme Court's "landmark case about landmarks" controlling the judiciary's highly permissive stance toward property regulations, notably historic preservation laws. Though initially employed to save beloved structures from destruction, historic preservation ordinances have proliferated to prevent the redevelopment of tens of thousands of buildings, worsening the country's housing shortage. But there are signs the Roberts Court is open to correcting course. In the 2021 case* Cedar Point Nursery v. Hassid*, the Court reinterpreted two well-established precedents governing takings challenges to favor property owners over regulators. Though so far cabined to "physical" takings,* Cedar Point *offers hope for regulatory takings challenges to historic preservation laws as well.*

Part I of this Note discusses the history of preservation laws in the United States and the Supreme Court's takings jurisprudence as it relates to such regulations both before and after Penn Central*. Part II explores the costs of such laws, both to individual property owners and society at large, and examines why the Court's takings jurisprudence has so far offered challengers little relief. Part II concludes by analyzing* Cedar Point *in light of the Court's underused but still-extant line of property-protecting precedents to suggest that the Court's deference to historic preservation laws may soon change. Part III then offers several avenues courts could take in the wake of* Cedar Point *to declare abusive historic preservation laws takings requiring compensation—and ideally clarify Takings Clause doctrine in the process.*

INTRODUCTION

Tom Messina owned and operated Tom's Diner in downtown Denver, "flipping pancakes and selling eggs" for 20 years.[1] His plan had long been to finance his retirement by selling his restaurant. At the age of 60, he verged on achieving this goal when a housing developer offered him $4.8 million to convert the diner into an 8-story apartment building. But the sale stalled when a local nonprofit called "Historic Denver" petitioned the city to designate Messina's property an historic landmark, thus preventing its redevelopment. If successful, the $4.8 million valuation reflecting the worth of new apartments in a housing-starved city would plummet, and

[1] Christian Britschgi, *Neighborhood Activists Would Rather Preserve Tom's Diner Than Let Its Owner Retire in Peace*, REASON MAGAZINE (August 1, 2019), https://reason.com/2019/08/01/neighborhood-activists-would-rather-preserve-toms-diner-than-let-its-owner-retire-in-peace/.

Messina—because of the reigning deferential takings test the Supreme Court has followed since a landmark case known as *Penn Central*[2]—would receive no compensation.[3]

When Messina received the offer from the developer in 2019, Denver was quickly becoming one of the country's least affordable cities; as increasing numbers of Americans relocated to the Rocky Mountain metropolis, its housing supply struggled to meet demand.[4] Many factors underlie Denver's failure to accommodate new arrivals, but a large contributor is the abuse of historic preservation laws like the one wielded against Messina. And this story is not unique to Denver. Historic preservation laws and other land-use restrictions stymie housing construction across America's cities and suburbs, increasing living costs and dampening economic growth in the process.[5] The Supreme Court's interpretation of the Fifth Amendment's Takings Clause—which ostensibly guards against infringements on private property rights without just compensation—has recently offered individuals like Messina little protection from these regulations. But there are signs takings jurisprudence has reached an inflection point. In 2021, the Supreme Court decided *Cedar Point Nursery v. Hassid*,[6] reinterpreting two well-established precedents governing takings challenges to favor property owners over regulators.[7] While much of the commentary surrounding *Cedar Point* has warned the decision foreshadows the undermining of other salutary regulations,[8] this Note argues that by curbing abusive historic

[2] 438 U.S. 104 (1978).
[3] Britschgi, *supra* note 1.
[4] *Report: Denver among U.S. cities with the fastest declining housing affordability*, DENVER7 (June 20, 2018), https://www.denver7.com/lifestyle/real-estate/report-denver-among-us-cities-with-the-fastest-declining-housing-affordability.
[5] *See* EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 11–12 (2011) and Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* 26, 46 (Nat'l Bureau of Econ. Research, Working Paper No. 21,154, 2015).
[6] 141 S. Ct. 2063 (2021).
[7] *See infra* section II.B.
[8] *See generally* Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV 160 (2021) (warning *Cedar Point* threatens several labor laws); Mark Joseph Stern, T*he Supreme Court's Latest Union-Busting Decision Goes Far Beyond California's Farmworkers*, SLATE (June 23, 2021), https://slate.com/news-and-politics/2021/06/supreme-court-union-busting-cedar-point-nursery.html (predicting the decision's consequences for government regulation "will be

preservation practices, *Cedar Point*'s liberalizing potential may offer a solution to the nation's housing shortage.

The argument proceeds as follows. Part I discusses the origins of historic preservation and explains why current takings doctrine has so far offered little protection from its abuse. Part II then discusses the adverse effects of historic preservation today, which were not understood at the time of *Penn Central*. Part II also examines the Takings Clause caselaw leading up to and including *Cedar Point*, arguing the protections the Court has developed against other property regulations logically apply against abusive historic preservation laws as well. Finally, Part III explores several avenues by which the Court might evolve its Takings Clause doctrine to ensure property owners are justly compensated for losses inflicted by historic preservation laws. Ultimately, this Note argues that a more robust understanding of the protections guaranteed by the Takings Clause would not forbid historic preservation, but would require the governments enacting such laws to compensate individuals targeted by the government's actions.

I. THE HISTORICAL AND LEGAL BACKGROUND

This Part explores the origins and evolution of historic preservation, as well as the major precedents rendering these laws essentially immune from legal challenges. Section I.A discusses the history of the preservation movement, while section I.B provides an overview of the caselaw governing takings challenges to property regulations such as preservation ordinances. This background helps explain the judiciary's highly deferential stance toward historic preservation laws thus far, but also why this deference has declined—and should continue to do so.

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swift and severe"); Nathan Newman, *This Supreme Court Case Could Wreck the New Deal Order*, THE NATION (Dec. 2, 2020), https://www.thenation.com/article/society/supreme-court-labor-unions/ (warning of a "roll back" of "large swaths of the regulatory state and civil rights laws").

A. The Laudable Origins but Sordid State of Historic Preservation Laws

The rise of the historic preservation movement can be told through the story of New York City's two main train terminals. The first, Penn Station—cramped, damp, and unremarkable today—was once one of the Empire State's proudest structures, replete with Doric columns and Roman baths.[9] In the words of architectural historian Vincent Scully, while one once "entered the city like a God," since Penn Station's destruction began in 1963, one "scuttles in now like a rat."[10] The demolition of New York's original Pennsylvania Railroad Station resulted from its owner's attempt to make up for falling revenues by replacing the Beaux Arts structure with "today's drab station, the new Madison Square Garden, and rent-bearing office towers."[11] But the most immediate effect of Penn Station's demise was the creation of New York City's Landmarks Preservation Commission (LPC) in 1965.[12] Tasked with identifying historic buildings and protecting them from destruction or alteration, the LPC became the model for similar boards throughout the United States.[13] Fifty years later, over 2,300 historic preservation ordinances now help govern the nation,[14] emboldened by a Supreme Court case concerning New York's other famous train terminal, Grand Central Station.[15]

Subsections I.A.1 and I.A.2 Omitted for Brevity

[9] Edward Glaeser, *Preservation Follies*, CITY J. (Spring 2010), https://www.city-journal.org/html/preservation-follies-13279.html.
[10] Herbert Muschamp, *Architecture View: In This Dream Station Future and Past Collide*, N.Y. TIMES (June 20, 1993), https://www.nytimes.com/1993/06/20/arts/architecture-view-in-this-dream-station-future-and-past-collide.html.
[11] Glaeser, *supra* note 9.
[12] *See About LPC*, NYC.gov, https://www1.nyc.gov/site/lpc/about/about-lpc.page (last visited Oct. 23, 2022) (noting the LPC's creation as a "response to the losses of historically significant buildings in New York City, most notably, Pennsylvania Station").
[13] William A. Fischel, *Lead Us Not into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 FORDHAM ENV'T. L.J. 749, 749 (1995).
[14] NAT'L TR. FOR HISTORIC PRES., A CITIZEN'S GUIDE TO PROTECTING HISTORIC PLACES: LOCAL PRESERVATION ORDINANCES 1 (2002), https://www.crt.state.la.us/Assets/OCD/hp/grants/certifiedlocalgovernment/documents-and-forms/A_Citizens_Guide_to_Protecting_Historic_Places.pdf.
[15] *See infra* section I.B.

B. Takings Jurisprudence Through *Cedar Point*

The Takings Clause of the Fifth Amendment of the United States Constitution states: "nor shall private property be taken for public use, without just compensation."[16] Perhaps the only non-disputed interpretation of this clause holds that the government must pay when it takes title over property through eminent domain.[17] It is also generally settled that the government must pay when its action "*reduces* the exclusive right of possession that an owner has in a single parcel of land."[18] These so-called "physical takings" differ from eminent domain because while an owner retains title over the property, courts still require compensation for impinging on the owner's right to exclude.[19] Finally, but most nebulously, courts have read the Takings Clause to require compensation when, in the words of Justice Holmes, a regulation "goes too far" in infringing on property rights.[20] How far is too far has generated much heat over the past century, but little light.[21]

1. Regulatory Takings

Scholars often regard Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon* as inaugurating the concept of regulatory takings.[22] "The general rule," Holmes wrote, "is that,

[16] U.S. CONST. amend. V. The Supreme Court has since clarified that the Takings Clause limits both the federal and state and local governments through the Fourteenth Amendment. *See* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 236 (1897) (Although the state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation.").
[17] *See* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993).
[18] RICHARD A. EPSTEIN, SUPREME NEGLECT 53 (2008) (emphasis in original). *See also* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.")
[19] Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotic Dominion" Gains Ground*, 2021 SUP. CT. REV. 125, 129–30 (2021). *See also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (calling the right to exclude the "*sine qua non*" of property).
[20] Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[21] *See generally* Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENV'T. L.J. 525 (2009) (suggesting the complex muddle that is takings jurisprudence is unavoidable).
[22] *See* Estlund, *supra* note 19, at 126; *see also* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1566 (2003) ("According to the standard story in takings law, the whole idea of a 'regulatory taking' was regarded as an oxymoron for more than 130 years. There was no such conceptual category, the story continues, until in a moment of distraction or senility Justice Oliver Wendell Holmes created the doctrine in the 1922 decision *Pennsylvania Coal Co. v. Mahon*.").

while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[23] Holmes' "general rule" is often described as unhelpful even by those appreciative of his attempt to defend private property rights.[24] Indeed, his cryptic pronouncement provided few hints of how to determine what regulations went "too far" besides an indication that "the extent of the diminution in value" mattered greatly.[25] Nearly four decades later, the Supreme Court offered some clarification that the purpose of the Takings Clause was "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[26] But for the most part, the half-century of regulatory takings cases post-*Pennsylvania Coal* generated little doctrine.[27]

This changed in 1978. In *Penn Central Transportation Co. v. New York City*, the Supreme Court reviewed a challenge to New York City's landmark preservation law brought by the Penn Central Company, the owner of Grand Central Station.[28] Penn Central claimed New York City's ordinance constituted a taking of the air rights over their property, where they intended to build a fifty-five-story tower that met all other zoning requirements.[29] By

[23] *Penn. Coal*, 260 U.S. at 415.
[24] *See, e.g.*, Claeys, *supra* note 22, at 1625; *see also* Sam Spiegelman & Gregory C. Sisk, *Cedar Point: Lockean Property and the Search for A Lost Liberalism*, CATO SUP. CT. REV., 2020–2021, at 165.
[25] *Penn. Coal*, 260 U.S. at 413.
[26] Armstrong v. United States, 364 U.S. 40, 49 (1960) (internal quotations omitted).
[27] Estlund, *supra* note 19, at 127. Thomas Merrill has helpfully described the regulatory takings doctrine as existing "to prevent the government from evading the obligation to pay just compensation, by disguising what would ordinarily be an exercise in eminent domain as a police power regulation." Thomas W. Merrill, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENV'T. L. 1, 28 (2018).
[28] 438 U.S. 104 (1978).
[29] EPSTEIN, *supra* note 18, at 119. *See also* Gary Lawson, Katharine Ferguson & Gullermo A. Montero, *Oh Lord, Please Don't Let Me Be Misunderstood: Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 30 (2005) ("Penn Central treated the ultimate issue as a straightforward syllogism: air rights are property; New York deprived Penn Central of the use of its air rights; therefore, New York took Penn Central's property.").

designating the site "protected," Penn Central argued, the city prevented a project that would have generated over $2 million in rents per year, and thus owed Penn Central compensation.[30]

Justice Brennan, writing for a 6-3 majority, rebuffed this challenge.[31] In this "landmark case about landmarks,"[32] the Court examined dozens of takings cases since *Pennsylvania Coal*, found a series of "essentially *ad hoc*, factual inquiries,"[33] and "prescribed more of the same."[34] Indeed, one scholar describes the decision as reflecting "primarily the work of a sleep deprived law clerk trying not to say anything new."[35] In reviewing such regulations, Brennan wrote, the Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government" but has nevertheless "identified several factors that have particular significance."[36] These factors, which would come to define *Penn Central*'s balancing test, included (1) the "economic impact of the regulation on the claimant"—particularly "the extent to which the regulation has interfered with distinct investment-backed expectations"—and (2) "the character of the governmental action."[37] Applying these factors to the case before it, the Court held the statute was not a taking.

The Court continued to affirm *Penn Central*'s applicability to regulatory takings challenges in 2002,[38] 2005,[39] and 2017.[40] Reiterating the Court's commitment to the "*ad hoc*, factual inquiry approach designed to allow careful examination and weighing of all the relevant

[30] EPSTEIN, *supra* note 18, at 119.
[31] *Penn Cent. Transp. Co.*, 438 U.S. at 107.
[32] Estlund, *supra* note 19, at 127.
[33] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[34] Estlund, *supra* note 19, at 127.
[35] Peter Byrne, Penn Central *in Retrospect: The Past and Future of Historic Preservation*, 33 GEO. ENV'T. L. REV. 399, 419–20 (2021) (noting the clerk who drafted the decision "prepared his draft over three 'all-nighters'" and was told by other clerks "the opinion better not say very much").
[36] *Penn Cent. Transp. Co.*, 438 U.S. at 124.
[37] *Id.* Clarifying this third factor, Brennan added that a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*
[38] Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 321 (2002).
[39] *Lingle*, 544 U.S. at 540.
[40] Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

circumstances" stemming from *Pennsylvania Coal* and *Penn Central*,[41] the justices continue to apply an approach to regulatory takings cases that ensures the government nearly always wins.[42]

2. Physical and Per Se Takings

Though keeping *Penn Central* intact, the Court has developed doctrines to avoid applying the deferential test to regulations it deems "physical" or "*per se*" takings of property. Where a regulatory taking leaves an owner's right to possess her property undisturbed but restricts her ability to use it, a physical taking deprives an owner of (at least some of) that property.[43] Physical takings always require compensation because of the unique burden they impose: "A permanent physical invasion," the Court has said, "however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests."[44] But while many physical takings are clear-cut cases requiring just compensation,[45] the distinction between physical and regulatory takings often breaks down.[46]

For this reason, since *Penn Central* the Court has deemed certain regulations *per se* takings that always require compensation, rather than regulatory takings subject to *Penn Central*'s deferential test.[47] The first of these *per se* exceptions, stemming from *Loretto v. Teleprompter Manhattan CATC Corp.*, involves government actions that authorize a permanent

[41] *Tahoe-Sierra*, 535 U.S. at 322.
[42] Claeys, *supra* note 22, at 1655 ("*Penn Central* is easy to apply as long as one does not mind if the government always wins.").
[43] EPSTEIN, *supra* note 18, at 97.
[44] *Lingle*, 544 U.S. at 539.
[45] *See* EPSTEIN, *supra* note 18, at 53–73 ("The simplest illustrations arise when the state takes land outright for a fort, road, or post office.").
[46] *See id.* at 46 ("The crucial modern constitutional distinction between physical and regulatory takings . . . rests on intellectual quicksand."). Or, as Chief Justice Roberts put it, "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Cedar Point*, 141 S. Ct. at 2072.
[47] *Lingle*, 544 U.S. at 538 (2005).

physical invasion of private property, however minor.[48] In *Loretto*, the Supreme Court held a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking requiring compensation even though the diminution in value to the owner's property was minimal.[49] The second exception, stemming from *Lucas v. South Carolina Coastal Council*, applies when "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good."[50] This *per se* rule holds that the government must pay just compensation for such "total regulatory takings" except to the extent that "background principles of nuisance and property law" independently restrict the owner's use of the property.[51] For regulatory takings challenges falling outside the two relatively narrow exceptions provided by *Loretto* and *Lucas*, however, *Penn Central* still controls.[52]

Of course, the composition and outlook of the Supreme Court has changed since that landmark case, and the current Court may be more sympathetic toward Justice Rehnquist's *Penn Central* dissent. In that opinion, citing previous cases, Rehnquist insisted that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired."[53] The restriction of Penn Central's air rights was effectively a negative easement, according to Rehnquist, and thus a compensable taking.[54] In Richard Epstein's view, Rehnquist's dissent "rightly rejected

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[48] 458 U.S. 419 (1982). *But see infra* section II.B discussing how *Loretto* has evolved.
[49] *Loretto*, 458 U.S at 435–35.
[50] 505 U.S. 1003, 1019 (emphasis in original) (finding South Carolina Beachfront Management Act constituted a taking without just compensation for preventing construction on property owner's beachfront properties).
[51] *Lucas*, 505 U.S. at 1026–32.
[52] *Lingle*, 544 U.S. at 528 ("Outside these two categories (and the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central*"). Land-use exactions fall outside the scope of this Note, but see Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013) for a recent explication of exactions principles.
[53] *Penn Cent. Transp. Co.*, 438 U.S. at 146 (Rehnquist, J., dissenting) (citing United States v. Dickinson, 331 U.S. 745 (1947)).
[54] *Id.* Rehnquist did clarify that regulations securing an "average reciprocity of advantage," by which he meant zoning laws, were not takings. *Id.* at 147. Government actions to quash nuisances were also exempt in his view. *Id.* at 145.

Brennan's *ad hoc* approach."[55] From a different perspective, Cynthia Estlund describes Rehnquist's dissent as laying out "a takings agenda for the anti-regulatory wing of the Court."[56] Beyond the few narrow carve outs discussed above, however, *Penn Central*, like the structure it protected, has avoided fundamental alteration these last few decades. But that may be changing.

3. Cedar Point's Inflection Point

In 2021, the Supreme Court addressed a California regulation granting union organizers access to agricultural worksites for three hours a day, 120 days a year.[57] In this case, *Cedar Point Nursery v. Hassid*, a 6-3 majority carved out another exception to the Court's regulatory takings doctrine to more stringently scrutinize a regulation than *Penn Central* would allow. Now, wrote Chief Justice Roberts, "[w]henever a regulation results in a physical appropriation of property"—even one granting access to property for just one-eighth of the hours in a day, one-third of the days in a year—"a *per se* taking has occurred, and *Penn Central* has no place."[58]

Scholars both sympathetic and unnerved by the Court's ruling took note of the Chief Justice's potentially sweeping majority opinion.[59] Richard Epstein called *Cedar Point* perhaps "the Supreme Court's most momentous takings decision in decades," one that by reinterpreting *Penn Central* and *Loretto* put other precedents protecting regulations from takings challenges "up for grabs."[60] Cynthia Estlund, meanwhile, argued the Chief's invocation of Blackstone's

[55] EPSTEIN, *supra* note 18, at 123. However, Epstein faulted Rehnquist for not extending his critique to land-use restrictions (such as zoning) writ large.
[56] Estlund, *supra* note 19, at 127.
[57] Cal. Code Regs. tit. 8 §20900(e)(1)(C) (2020).
[58] *Cedar Point*, 141 S. Ct. at 2072.
[59] *See generally, e.g.*, Richard A. Epstein, *A Bombshell Decision on Property Taking*, HOOVER INSTITUTION (June 28, 2021), https://www.hoover.org/research/bombshell-decision-property-takings; Julia D. Mahoney, *Cedar Point Nursery and the End of the New Deal Settlement*, 11 BRIGHAM-KANNER PROP. RTS. CONF. J. 43 (2022); Estlund, *supra* note 19; Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. OF CONST. L. & PUB. POL'Y 1 (2022).
[60] Epstein, *supra* note 59. Writing in a similar vein, Julia Mahoney appreciated the Court's "normalization of property rights," describing *Cedar Point* as "not a radical decision, but an incremental one . . . [which] (slightly) clarifies takings doctrine." Mahoney, *supra* note 59, at 54

strong conception of private property rights may augur a return to the *Lochner* era.[61] *Cedar Point*, she warned, "potentially reopens long-dormant constitutional assaults on the law of work, landlord-tenant relations, and civil rights."[62]

Chief Justice Roberts' reasoning in *Cedar Point* will be discussed in greater detail below.[63] The present point is that the decision has moved takings jurisprudence further from *Penn Central*'s deference. Lee Ann Fennell, for instance, argues *Cedar Point* rendered regulatory-takings doctrine "a gratuitously convoluted analytic environment," which "works well as part of a selective scrutiny machine—one designed to preserve restrictions that broadly conserve the established interests of landowners while scrutinizing and financially burdening any property impositions that do otherwise."[64] While perhaps an overly legal-realist way of viewing the decision, Fennell has a point: *Cedar Point* illustrates how the Court's takings doctrine operates as a selective scrutiny machine, one which the Court can, consistent with its precedents, choose to apply to historic preservation. Part III of this Note will discuss how the Court could choose to deploy this machine, but first Part II must argue why it can—and should.

II. The Degradation of Preservation and Devolution of Property Protections

Part I discussed the origins of historic preservation and the legal doctrines the Supreme Court has developed largely insulating preservation ordinances from review. This Part discusses the costs of that neglect and argues that in light of both the Court's long-standing and more-recent precedents, such deference is not foreordained. Section II.A discusses the economic and social consequences of excessive land-use regulation, exacerbated by the explosion in historic preservation discussed in Part I. Section II.B then analyzes the caselaw underlying and building

[61] Estlund, *supra* note 19, at 144.
[62] *Id*.
[63] *See infra* section II.B.
[64] Fennell, *supra* note 59, at 4.

on *Penn Central* to suggest why, in light of the change in facts since the *Penn Central* decision in 1978, the application of the law should—and, consistent with precedent, can—change as well.

A. The Costs of Historic Preservation

Omitted for Brevity

B. The Increasingly Untenable Asymmetry Between Regulatory and *Per Se* Takings

As introduced in Part I, a court's decision between applying *Penn Central* or a *per se* rule presents two wildly inconsistent regimes for deciding takings challenges.[65] While a regulation requiring landlords to install cable boxes triggers the full protection of the Takings Clause, for instance, a landmark designation wiping out millions of dollars in value does not. In *Cedar Point*, by reinterpreting and expanding *Loretto*'s holding that any abrogation of the right to exclude, permanent or not, triggers the Takings Clause, Chief Justice Roberts narrowed the gap between *Penn Central* and *Loretto*'s *per se* rule.[66] But the disconnect between *Penn Central* and the *Lucas per se* rule remains. Those challenging economically-destructive property regulations thus still face the daunting prospect that if the regulation allows their property to retain even a modicum of value, *Penn Central* applies, and their challenge will likely fail. This section argues that in light of *Cedar Point*'s expansive rhetoric and the principles underlying the Court's takings jurisprudence, this once awkward-but-navigable gap has become a chasm—one that is unlikely to survive a renewed round of regulatory takings challenges.

1. Fairness, Justice, and Penn Central*'s Declining Persuasiveness*

Before Justice Holmes' "too far" pronouncement, the Supreme Court understood that the Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government," ensuring just compensation is paid when an individual

[65] *See supra* section I.B*; see also* Epstein, *supra* note 59.
[66] *See* Epstein, *supra* note 59.

"surrenders to the public something more and different from that which is exacted" from others.[67] Justice Holmes reaffirmed this principle from *Monongahela* in *Pennsylvania Coal*, warning that governments were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[68] The question at bottom was "upon whom the loss of the changes desired should fall," and Holmes' answer was the government enacting the change, not the individual subject to it.[69] This understanding—that the Takings Clause ensures fairness for individual property rights—was conveyed again in *Armstrong v. United States*, where the Court reiterated that the Constitution bars the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[70]

The Court's concerns about fairness and justice have shone through many of its seminal takings cases in a way relevant to historic preservation laws today. In *United States v. Causby*, for instance, the Court recognized a taking where continuous flights by U.S. military jets over Causby's land "terrorized" his chickens, thus destroying the viability of his commercial chicken farm business.[71] The flights, which "occurred on only 4% of takeoffs and 7% of landings at the nearby airport,"[72] did not destroy "*all* economically beneficial uses" of the property,[73] but the Court did not find this dispositive. "There is no material difference," the Court wrote, between a hypothetical case where the flights took away all use (which the government conceded would constitute a taking), "and the present one, except that [in the present case] enjoyment and use of

[67] Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893) (awarding full compensation to the Monongahela company, which had expended large sums of money improving the Monongahela River by means of locks and dams, after the United States condemned this property for its own use).
[68] *Pennsylvania Coal*, 260 U.S. at 416.
[69] *Id.*
[70] 346 U.S. 40, 49 (1960).
[71] United States v. Causby, 328 U.S. 256, 259 (1946).
[72] *Cedar Point*, 141 S. Ct. at 2075 (citing *Causby*, 328 U.S. at 259).
[73] *Lucas*, 505 U.S., at 1019.

the land are not completely destroyed. But that does not seem to us to be controlling."[74] Further, the Court continued, "while the landowner owns at least as much of the space above the ground" as he can occupy or make use of, "[t]he fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material."[75]

The principles elucidated in *Monongahela*, *Pennsylvania Coal*, *Armstrong*, and *Causby* would seem to cut in favor of Penn Central's argument that the landmark designation unfairly forced Penn Central to bear a cost (the loss of their air rights) for an ostensible benefit (maintaining the aesthetics of Grand Central) enjoyed by the public. Justice Rehnquist made this argument in his *Penn Central* dissent, citing both *Causby* and *Monongahela* for the proposition that while Penn Central could continue to use the Terminal, New York City otherwise "exercise[d] complete dominion and control over the surface of the land" and thus must compensate the owner for the loss.[76] Justice Brennan's majority opinion sidestepped this point by folding *Causby* under the "character" factor of his test. A taking, he wrote, may more readily be found when the challenged interference with property can be characterized as a physical invasion—as he characterized the jets' flights—"than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[77]

But Justice Brennan's attempt to distinguish the challenge in *Causby* from that in *Penn Central* now appears weak on at least two fronts. First, given the state of historic preservation laws today, it is far more dubious now than in 1978 that historic designations judiciously adjust "the benefits and burdens of economic life" for the common good.[78] Second, Brennan did not

[74] *Causby*, 328 U.S. at 261–62.
[75] *Causby*, 328 U.S. at 264 (citing Hinman v. Pac. Air Transp., 84 F.2d 755. (9th Cir. 1936)).
[76] *Penn Cent. Transp. Co.*, 438 U.S. at 146 (Rehnquist, J., dissenting).
[77] *Id.* at 124.
[78] *See supra* section II.A for discussion of the economic and social costs of preservation, as well as the often racist and classist motivations and results of historic preservation and other land-use regimes.

adequately address Penn Central's concern that its property had been "subjected to a nonconsensual servitude not borne by any neighboring or similar properties."[79] While Brennan invoked *Welch v. Swasey*,[80] a 1909 decision holding height restrictions do not require compensation under the Takings Clause, city-wide height limits justified on safety grounds do not necessarily support individual-property restrictions for aesthetic (or, increasingly, self-interested and exclusionary) reasons.[81]

Perhaps because of these weaknesses, the Court's jurisprudence since *Penn Central* moved in Rehnquist's direction.[82] This became most evident in the 1987 case *First English Evangelical Lutheran Church of Glendale v. Los Angeles*,[83] in which the Court ruled for a church challenging a California regulatory ordinance temporarily prohibiting construction on its property. The same concerns about justice and fairness motivating Rehnquist's *Penn Central* dissent animated his majority opinion in *First English*. Citing a nineteenth-century case construing the Wisconsin Constitution's Takings Clause, Rehnquist reaffirmed the Court's view from *Armstrong* that it "would be a very curious and unsatisfactory result" if the clause meant that "if the government refrains from the absolute conversion of real property to the uses of the public it can . . . in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use."[84] In later cases,

[79] *Penn Cent. Transp. Co.*, 438 U.S. at 143 (Rehnquist, J., dissenting).
[80] 214 U.S. 91 (1909) (invoked in *Penn Cent. Transp. Co.*, 438 U.S. at 130).
[81] *See supra* notes __–__ and surrounding text on exclusionary zoning. [**Citing notes in omitted section**]
[82] *See generally* Chauncey L. Walker & Scott D. Avitabile, *Regulatory Takings, Historic Preservation and Property Rights Since Penn Central: The Move Toward Greater Protection*, 6 FORDHAM ENVTL. L.J. 819 (1995) (noting that "a number of state, federal, and Supreme Court decisions have distinguished *Penn Central* and created tests providing greater protection of private property rights by requiring the payment of compensation for regulatory restriction.").
[83] 482 U.S. 304 (1987).
[84] *Id.* at 316–17 (citing Pumpelly v. Green Bay Co., 13 Wall. 166, 177–78 (1872).

Rehnquist wrote, the Court "unhesitatingly applied this principle" to find takings where government actions deprived individuals of substantial use and enjoyment of their property.[85]

And yet, despite the apparent turn in the Court's takings jurisprudence, *Penn Central* lived on, limited only by the narrow *Lucas* and *Loretto* carve-outs discussed above.[86] In 2002, over Rehnquist's dissent, the Court even narrowed *First English*, applying the *Penn Central* test to a temporary moratorium on building in Lake Tahoe to hold that the law did not constitute a taking.[87] With *Penn Central* again reaffirmed, state and lower federal courts continued to apply its deferential balancing test to regulatory takings challenges, with predictable results. Despite the Court's numerous affirmations that the Takings Clause protects individuals from bearing costs that fairness and justice demand be borne by the public at large, "*Penn Central* balancing involves little more than a rhetorical bow to private property rights in the course of upholding state or local regulation."[88] Whether in federal or state court practice, relegation to *ad hoc* adjudication almost invariably marks the death knell for takings claims.[89]

But *First English* remains law,[90] as do *Armstrong*, *Causby*, *Pennsylvania Coal*, and *Monongahela*. The Takings Clause still offers some protection from government acts that go "too far," however nebulous and shifting "too far" seems to be. And in light of a much more recent takings decision, the Court's new majority appears willing to redraw that line again.

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[85] *Id.* at 317 (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. Dickinson, 331 U.S. 745, 750 (1947); United States v. Causby, 328 U.S. 256 (1946)).
[86] *See supra* section I.B. The Court's "exactions" doctrine provides a further limit on *Penn Central* but, as noted above, this discussion falls outside the scope of this Note. *See also supra* note 52 and Fennell, *supra* note 59, at 26.
[87] *Tahoe-Sierra Preserv. Council, Inc.*, 535 U.S. at 342 (holding that a temporary, regulatory taking claim was not controlled by the *Lucas per se* takings rule, but rather by the *Penn Central* balancing test).
[88] James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 88 (2016).
[89] *Id*. at 88.
[90] Though the Court declined to apply *First English* to the building moratorium being challenged in *Tahoe-Sierra*, Justice Stevens noted that "*First English* was certainly a significant decision, and nothing that we say today qualifies its holding." *Tahoe-Sierra*, 535 U.S. at 328.

2. Cedar Point's Half Measures

As briefly discussed above,[91] *Cedar Point* held that a California regulation granting union organizers limited access to farm worksites was a *per se* taking.[92] The suit arose after members of the United Farm Workers labor union entered Cedar Point's farm one morning and began shouting through bullhorns.[93] Taking issue with the regulation sanctioning this activity, Cedar Point challenged it as an unconstitutional *per se* taking, alleging it appropriated without compensation an easement for union organizers to enter their property. The district and circuit courts rejected the challenge, applying the *Penn Central* test and siding with the defendants.[94]

The Supreme Court disagreed. By classifying the regulation as a physical occupation and therefore a *per se* taking, the Supreme Court avoided applying *Penn Central*'s deferential balancing test usually applied to regulations, relying on the *Loretto* "physical occupation" carve out for *per se* takings instead.[95] As Richard Epstein noted, Chief Justice Roberts' opinion for the Court reflects his characteristic incremental approach, professing to maintain precedents such as *Loretto* while subtly reinterpreting their core holdings.[96] But this has led to an illogical and perhaps unsustainable asymmetry between temporary physical occupations and regulations resulting in near-total diminutions in value. If a government act is conceived of as a physical occupation, as in *Cedar Point*, "the Court views even the most trivial temporal shards of physical access as *per se* takings," while if not, even a regulation "making land totally unusable for several years still gets *Penn Central* treatment under *Tahoe Sierra*."[97] Given the Court's long-

[91] *See supra* section I.B.3.
[92] *Cedar Point*, 141 S. Ct. 2063 at 2072. *See also supra* section I.B.3.
[93] *Cedar Point*, 141 S. Ct. 2063 at 2069–70.
[94] *Id.* at 2070.
[95] *See supra* section I.B.
[96] *See* Epstein, *supra* note 59 (writing that *Cedar Point* "does indeed reinterpret two well-established precedents: [*Penn Central* and *Loretto*].").
[97] Fennell, *supra* note 59, at 40–41.

stated concerns about the fairness and justice of property regulations, this asymmetry seems unlikely to last.[98]

The storm of commentary[99] set off by the Chief Justice's purportedly modest change in takings jurisprudence[100] suggests why. Richard Epstein argued it suddenly put property regulations like rent control or anti-eviction laws "up for grabs" given how divergently the Court scrutinizes what it considers "physical" versus "regulatory" takings.[101] Aziz Huq similarly sees "enough kindling in the Chief Justice's decision to help spark dramatic changes in [takings] law" given the Court's willingness to reinterpret *Loretto*—originally understood as a regulatory takings case—as a decision about the appropriation of property.[102] This kindling is evident from the Chief Justice's opening lines of Part II of his opinion expounding the origins of the Takings Clause with quotes from America's founders[103] and William Blackstone—the latter cited approvingly for the proposition that "the very idea of property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'"[104] The influence of a Lockean

[98] *See* Fennell, *supra* note 59, at 41 ("We can't expect this asymmetry to last long, especially when governments can often employ use restrictions as substitutes for access-based regulations.").
[99] *See supra* notes 8, 19, and 59.
[100] *See Cedar Point*, 141 S. Ct. at 2078–80 (describing as "unfounded" the dissent's concerns that the Court's decision would "endanger a host of state and federal government activities involving entry onto private property.").
[101] Epstein, *supra* note 59 ("It is pure sophistry that the state does not engage in a taking when it authorizes a tenant to stay continuously in possession of the leased premises after the expiration of the lease at a rent that is consciously set below market value."). Epstein also expressed dissatisfaction that *Cedar Point* failed to counteract "land-use zoning ordinances, such as density restrictions, [that] can wipe out huge portions of value." *Id.*
[102] Aziz Z. Huq, *Property against Legality: Takings after* Cedar Point, 109 VA. L. REV. 26 (forthcoming 2023).
[103] *Cedar Point*, 141 S. Ct. at 2071 ("The Founders," the Chief Justice writes, "recognized that the protection of private property is indispensable to the promotion of individual freedom.") The Chief Justice then quotes John Adams' maxim that "[p]roperty must be secured, or liberty cannot exist," as well as the Court's recent reaffirmation that the "protection of property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Id*.
[104] *Id.* at 2072 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES 2 (1766)). Blackstone's understanding of property was capacious and extended beyond the right to exclude: Property "consists in the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution, save only by the laws of the land." 2 WILLIAM BLACKSTONE, COMMENTARIES 2 (1766). Richard Epstein notes that this last clause on the "law of the land" meant that regular procedures had to be used to deprive an individual of property, not that property was held at the grace of

conception of property rights is manifest, implying greater protections than the mid-twentieth-century Court offered.[105]

Yet the impact of *Cedar Point* on future historic preservation challenges is uncertain. Despite his championing of property rights, Chief Justice Roberts left *Penn Central* aside from his analysis. "The essential question," he wrote, "is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."[106] If the former, the regulation is a *per se* taking, and compensation is due; if the latter, *Penn Central* governs, and an owner's hopes for compensation are likely doomed.

Under a rigid application of the Court's existing precedents, historic preservation laws likely still fall on the latter side of that line; they do not authorize "invasions" in the same way California's law authorizing union organizers to enter properties did. But given *Cedar Point*'s reasoning, it is not clear such a rote application of precedent would be appropriate. *Cedar Point* categorized *Causby* in the former category, for instance, even though the overhead military flights could hardly be said to have "physically taken property" from the owner.[107] While the flights can be described as "government-authorized physical invasions" of Causby's airspace, Roberts also described this as a "property interest taken as a servitude"—exactly how Justice Rehnquist in his *Penn Central* dissent characterized Penn Central's loss of air rights.[108] Given that the rationale for much historic preservation is the benefit of the community, it is thus

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the legislature. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 22 n.5 (1985).

[105] *See* Spiegelman & Sisk, *supra* note 24 (arguing *Cedar Point*, despite its flaws, might mark an end to the takings muddle); Mahoney, *supra* note 59 (arguing *Cedar Point* portends a "normalization" of property rights in which property rights received serious constitutional protection).

[106] *Cedar Point*, 141 S. Ct. at 2072.

[107] *Id*. at 2073.

[108] *Penn Cent. Transp. Co.*, 438 U.S. at 143; *see also supra* note 53 and surrounding text.

conceivable that the Court in a future case could consider a preservation ordinance an example of "the government" having "taken property for itself or someone else—by whatever means."[109]

The Court could also, of course, go further. Rather than incrementally moving more and more property regulations out of the "regulatory takings" bucket and into the "physical or *per se*" bucket, the Court could rethink its approach to regulatory takings entirely, perhaps curing the *Penn Central–Lucas* discontinuity in the process. At least one member of the Court has recently pressed this approach. Noting the centennial of Holmes' "too far" test, Justice Thomas urged the Court to finally provide clear guidance as to what this means: "If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs."[110] *Cedar Point* conveyed the Court's appetite for defending property rights from regulations, at least when it could cast those regulations as "appropriating" property, no matter how small the impact of that appropriation may be.[111] But if the Court wishes to go further and take up Justice Thomas' request, its precedents, early and modern, provide it with ample opportunities.[112]

III. Plausible Paths Out of the Takings Muddle

Omitted for Brevity

Conclusion

Let us return to where we started. Denver, like many American cities, has a history of using its regulatory power to prohibit new housing in response to local pressure. Carol Rose, in

[109] *Cedar Point*, 141 S. Ct. at 2072.
[110] Bridge Aina Le'a v. Hawaii Land Use Commission, 141 S. Ct. 731, 732 (2021) (Thomas, J., dissenting from denial of certiorari).
[111] Fennell calculates the compensation owed for many regulations the Supreme Court deems takings are quite small, rendering *Cedar Point* possibly less consequential than it may seem. *See* Fennell, *supra* note 59, at 59.
[112] Notably, one federal judge recently took Justice Thomas up on this proposal. In a concurrence, Judge Stephanos Bibas of the Third Circuit wrote that while he was bound by Supreme Court precedent, a better solution to regulatory takings challenges would be to go back to the original public meaning of the Takings Clause. "Under that standard," he wrote, "the government would have to compensate the owner whenever it takes a property right and presses it into public use—even if the taking did not involve a physical invasion." Nekrilov v. City of Jersey City, 45 F.4th 662, 681 (3rd Cir. 2022) (Bibas, J., concurring). While such a reading that physical invasions are not necessary to find a taking would support the argument advanced here, a thorough investigation of the original understanding of the Takings Clause falls outside the scope of this doctrine-focused Note.

her classic 1981 survey of historic preservation law, wrote of the city's "last-minute creation of an historic district" to prevent a new development in one portion of the city, and warned of "the uses that proponents of exclusionary zoning might find for historic district organization."[113] Over forty years later, Rose's warning has not just been fulfilled but exceeded, to the detriment of housing affordability, economic growth, and a host of other social concerns.

The Court's past and present Takings Clause doctrine offers a solution. Notwithstanding *Penn Central*, the Supreme Court's precedents both before and after that case suggest at least some applications of historic preservation laws sufficiently impinge on property rights to trigger Constitutional protection. The tactics a court uses to heighten the Takings Clause scrutiny given to an historic preservation law are ultimately less important than the fact a court applies greater scrutiny at all. Legislators intent on landmarking private properties will of course remain free to do so—provided they compensate the individuals subject to their decisions—but the promise and purpose of the Takings Clause will thus be fulfilled: The public at large will bear the burdens fairness and justice command must not be borne by the affected individuals alone.

[113] Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 523–24 (1981) (citing Kronholz, *Denver's Inner City Enjoys a Resurgence*, WALL ST. J., Mar. 30, 1979, at 40, col. 1).